



ADMINISTRATIVE LAW SECTION

In the Supreme Court

Appeal from the Michigan Court of Appeals

SBC MICHIGAN,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
Defendant-Appellee.

Docket No. 134493

Court of Appeals No. 264862

MPSC No. 00-013079

SBC MICHIGAN,

Plaintiff-Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
Defendant-Appellant.

Docket No. 134500

Court of Appeals No. 264862

MPSC No. 00-013079

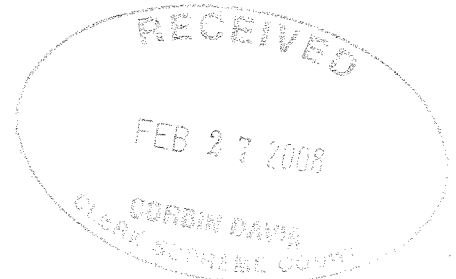
BRIEF AMICUS CURIAE
SUBMITTED BY THE STATE BAR OF MICHIGAN
ADMINISTRATIVE LAW SECTION

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ADMINISTRATIVE LAW SECTION

Respectfully submits the following position on:

✧

Amicus Curiae Brief in
SBC Michigan v Michigan Public Service Commission
Supreme Court No. 134493 & 134500

*

The Administrative Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Administrative Law Section only and is not the position of the State Bar of Michigan. To date, the State Bar does not have a position on this matter.

The total membership of the Administrative Law Section is 436.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 12. The number who voted in favor to this position was 9. 2 members abstained from the vote, and 1 member did not vote. 0 voted against this position.

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The Interests of the Amicus Curiae—Administrative Law Section

The State Bar of Michigan Administrative Law Section, in response to the Court’s Order, dated December 13, 2007, inviting “persons or groups interested in the determination of the issues presented in this case” to move for permission to file briefs amicus curiae, moves for permission to address issue # 1 outlined in the Order. Our purpose in submitting this Brief is not to argue in favor of or against one of the parties in this case, but instead to offer general guidance regarding the appropriate legal framework to be applied in cases where an administrative agency’s interpretation of the law it administers is called into question. We do so in recognition of the important need for a uniform and consistent legal framework for Administrative Law litigants and practitioners alike.

Summary of Argument

Based upon the foregoing review of Michigan case law and keeping in mind the purposes of uniformity and consistency, we recommend considering the following factors when evaluating an agency’s interpretation of a law it administers: If the statute is clear and unambiguous, apply the rules of statutory construction to discern legislative intent. If the statute is ambiguous or vague (i.e., if reasonable minds can differ regarding its meaning), the degree of deference afforded to the agency’s interpretation of the law it administers depends upon the following factors: (1) How long the statute has been in existence, (2) whether the interpretation has been repeatedly and consistently applied by the agency, (3) whether the agency’s interpretation is reasonably consistent with the purpose and policies of the statute or regulation in question, and (4) whether the agency’s interpretation is contrary to existing law.

Question Presented for Review

What legal framework appellate courts should apply to determine the degree of deference due an administrative agency in its interpretation of a statute within its purview?

Statement of Material Proceedings and Facts

SBC Michigan (“SBC”) assessed a \$71 service charge to customers whose problem with phone service was determined to be the customer’s inside wiring. *SBC Michigan v Public Service Commission*, 276 Mich App 55; 740 NW2d 523 (2007). The Michigan Public Service Commission (the “PSC”) initially determined that SBC violated MCL 484.2502(1)(a) for making false statements to customers and required that SBC stop imposing a service charge for diagnosing or responding to a problem of this nature without “physical entrance into the customer’s premises.” *See id* at 57-58. The Court of Appeals remanded the matter to the PSC for clarification on the ambiguous Order. In response, the PSC issued the following language:

Upon careful reconsideration of the record, the Commission perceives some ambiguity as well, and clarifies its previous order to provide that SBC need not enter a customer’s premises *every* time that SBC is called upon to make a service trip. However, SBC has an obligation, as set forth in its tariff, to maintain and repair its own network facilities, up to the point of the customer interface (the Network Interface Device), at no additional charge to a customer. Company witnesses confirmed this responsibility in their testimony. . . . Thus, SBC may not charge its customers for the cost of services it provides to inspect, diagnose, and repair malfunctions covered by its tariff obligation, including routine physical checks of its own facilities, in response to complaints or inquiries, when reasonably necessary to diagnose and pinpoint problems attributable to its own network or exclude its facilities as a possible cause of disruptions to customer service. The Commission further finds that, since the ordering section of the order simply directs SBC to cease and desist from further violations of the [Michigan Telecommunications Act], the order itself does not require amendment. *See id* at 58.

On August 31, 2005, SBC appealed the PCS’s Order to the Court of Appeals. On June 12, 2007, the Court of Appeals issued its Order remanding the matter to the PCS

for entry of a modified order that removes any PCS regulation of costs or services attributable to a correct determination by SBC that a problem with telephone service is due to a customer’s nonregulated inside wiring. The portion of the order directing SBC that it may not impose charges on customers with regard to services ‘to diagnose problems attributable to its own facilities’ need not be disturbed because it does not violate the FCC’s preclusion of state common-carrier regulation of inside wiring.’ *See id* at 66.

The Court found that substantial evidence supported the PSC's finding of "systemic problems with SBC's practices related to diagnosing whether service disruptions were due to inside wiring." *See id.*

On July 24, 2007, SBC filed an Application for Leave to Appeal to the Supreme Court, as did the PSC. On December 13, 2007, the Supreme Court granted the applications and permitted interested "persons or groups" to move for permission to file briefs amicus curiae. *See SBC Michigan v Michigan Public Service Commission*, ___ Mich __; 741 NW2d 834 (2007). The State Bar of Michigan Administrative Law Section represents one such interested group. The Administrative Law Section was formed, in part, "to encourage sound administrative, legislative and judicial action relating to administrative law in order to secure and preserve justice and freedom for all persons and entities." *See Bylaws of the Administrative Law Section of the State Bar of Michigan, Section 2(e).*¹

Legal Argument

DETERMINING THE DEGREE OF DEFERENCE TO BE AFFORDED TO AN ADMINISTRATIVE AGENCY'S INTERPRETATION OF A STATUTE WITHIN ITS PURVIEW

In Michigan, Article 6, Section 28 of the Michigan Constitution of 1963 supplies the general standard of review for agency determinations:

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. *See Const 1963, art 6, § 28.*

The above language suggests two components to the inquiry: (1) Whether agency decisions are "authorized by law"; and (2) whether the agency's findings are "supported by competent,

¹ <<http://www.michbar.org/adminlaw/councilinfo.cfm>> (accessed February 14, 2008).

material and substantial evidence on the whole record.” In this brief, we focus our discussion on the first component of the standard of review inquiry.

The U.S. Supreme Court in *Chevron USA, Inc v National Resources Defense Council, Inc*, 467 US 837; 104 S Ct 2778 (1984) defined the modern standard for reviewing a *federal* agency’s interpretation of the *federal* laws it is charged with administering:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of the Congress is clear, that is the end of the matter; **for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.**

If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction the statute, as would be necessary in the absence of an administrative interpretation. Rather, **if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute** [emphasis added.] *See id* at 842-843.

However, the Court warned that, “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent [citations omitted.]” *See id* at 843, n 9.

The *Chevron* doctrine arguably places the agency in a position to define an ambiguous statute in the face of legislative silence instead of the courts. The *Chevron* Court reasoned that, “[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress [citation omitted].” If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation . . .” *See id* at 843-844. The Court went on to explain that, where the delegation is implicit, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency.” *See id*. The Court further reasoned that

agencies that administer the laws in question are the experts in sometimes highly technical subject areas, and not reviewing judges. *See id* at 865. In addition, an agency, as part of the Executive branch of government, is publicly accountable for its decisions; whereas, federal judges are shielded from being voted out of office. *See id* at 865-866.

In 2002, The U.S. Supreme Court considered a Michigan agency's interpretation of federal law in *Yellow Transp, Inc v Michigan*, 537 US 36; 123 S Ct 371 (2002). The Court, citing *Chevron, supra*, elucidated the following standard:

If the statute speaks clearly 'to the precise question at issue,' we 'must give effect to the unambiguously expressed intent of Congress [citation omitted.]' If the statute is instead 'silent or ambiguous with respect to the specific issue,' we must sustain the agency's interpretation if it is 'based on a permissible construction of the statute.' *See id* at 45.

In the years both before and since *Chevron, supra*, and its progeny, Michigan courts have arguably proven inconsistent in their use of a legal framework to evaluate the appropriate degree of deference to afford state agency interpretations of state or federal statutes it administers. *See generally* Justice Brickley's dissent in *Consumers Power Co v Public Service Com'n*, 460 Mich 148; 596 NW2d 126 (1999). In 1917, the Michigan Supreme Court declared that "serious consideration" should be afforded to an agency's statutory interpretation if the agency "fulfills the plain language of the statute." *See Petulski v Belmont Realty Co*, 198 Mich 38, 45; 164 NW 481 (1917).

By the 1960s, the Michigan Supreme Court applied a different standard that incorporated the concepts of legislative acquiescence and a greater reluctance to overrule any agency interpretation "without cogent reasons." *See e.g., Wehmeier v W.E. Wood Co*, 377 Mich 176, 191-192; 139 NW2d 733 (1966) and *Magreta v Ambassador Steel Co*, 380 Mich 513, 519; 158 NW2d 473 (1968). The Court in *Wehmeier, supra*, reasoned that an agency's years of consistent interpretation together with the legislature's silence on the precise issue throughout those years, indicated the legislature's "assent by

its silence.” *See id* at 191-192. The Court in *Magreta, supra*, opined that, “the construction given to a statute by those charged with the duty of executing it is **always** entitled to the **most respectful consideration** and ought not to be overruled without cogent reasons [emphasis added and quoting *Boyer-Campbell Co. v Fry*, 271 Mich 282, 296; 260 NW 165 (1935).]” *See id* at 519. The *Magreta* Court reasoned that the legislature in that case made several changes to the statute at issue over the years, but during that time, failed to address the specific issue in any of those amendments, presumably aware of the prior agency interpretation regarding the specific issue.

More recently, Michigan courts discussed additional standards for evaluating the degree of deference that should be afforded to an agency interpretation. Some required that greater deference be afforded to “the construction placed upon statutory provisions . . . [in place] for a long period of time [quoting *Southfield Police Officers Ass’n v Southfield*, 433 Mich 168, 177; 445 NW2d 98 (1989).]” *See Ludington Service Corp v Acting Com’r of Ins*, 444 Mich 481, 491; 511 NW2d 661 (1994). Later, the Michigan Supreme Court arguably set forth the most flexible standard for evaluating an agency interpretation yet: “The appellate courts, on judicial review, will give the agency’s construction **such weight as it concludes is appropriate** on full consideration of the statutory criteria and the record of the case on review [emphasis added.]” *See West Bloomfield Hosp v Certificate of Need Bd*, 452 Mich 515, 524; 550 NW2d 223 (1996).

Two years later, the Court set forth a more specific standard of review that appeared to draw from its prior decisions on the matter and indicate a greater reluctance to disturb an agency interpretation, unless it appeared to contain a legal violation or error. *See Adrian School Dist v Michigan Public School Employees Retirement System*, 458 Mich 326, 332 & 336; 582 NW2d 767 (1998). More specifically, the Court stated that an agency’s interpretations of the statutes it administers are “entitled to great weight,” unless “they violate the constitution or a statute or contain a substantial

and material error of law.” *See id.* The Court also reasoned that, “[t]he public policy that allows agencies to establish new principles through contested case proceedings is premised on the fact that an agency cannot promulgate rules to cover every conceivable situation.” *See id.* at 336. It also stated that the decisions must also be “consistent with the purpose and policies of the statute in question,” i.e., “if reasonable minds can differ regarding its meaning, then judicial construction is appropriate.” *See id.* at 332. The Court reasoned that it must ascertain legislative intent first and foremost.

Along the lines of the reasoning in prior cases employing the concept of legislative acquiescence, the Michigan Court of Appeals appeared to afford a higher degree of deference towards longstanding interpretations of a long-existing statute than towards recent interpretations of newer statutes. *See e.g., In re Michigan Cable Telecommunications Ass’n Complaint*, 238 Mich App 686; 609 NW2d 854 (2000) and *In re Canales Complaint*, 287 Mich App 487; 637 NW2d 236 (2001). The *Canales* Court indicated that it affords PSC decisions “substantial deference” where those decisions are supported by the record or “otherwise reasonable.” *See id.* at 496. The Court also pointed out that a challenger to the decision cannot simply point to another plausible interpretation of the statute to demonstrate “by clear and convincing evidence” that the agency’s interpretation was in error. *See id.* Another decision cited agency interpretations consistent with legislative history or containing persuasive reasoning as reasons for affording greater deference. *See Nelson v Associates Financial Services Co of Indiana, Inc.*, 253 Mich App 580, 597; 659 NW2d 635 (2002).

In 2003, Michigan courts appeared to veer closer to the *Chevron* analysis of agency interpretations by first deciding whether the subject statute is ambiguous, and if so, to defer to the agency’s interpretation if that construction is lawful. *See State Treasurer v Abbott*, 468 Mich 143, 148; 660 NW2d 714 (2003) and *City of Romulus v Michigan Dept of Environmental Quality*, 260 Mich App 54,

65-66; 678 NW2d 444 (2003). However, the most recent Michigan court decisions on these issues tend to add some discussion of the age of the interpretation. *See e.g., By Lo Oil Co v Dept of Treasury*, 268 Mich App 19, 50; 703 NW2d 822 (2005) (providing that courts must afford “great weight” to the agency’s “longstanding, consistent interpretation of the statute,” unless it is “clearly erroneous” or contradicts the statute’s “plain meaning”) and *Office of Planning Group, Inc v Baraga-Houghton-Keweenaw Child Development Bd.*, 472 Mich 479, 492, n 23; 697 NW2d 871 (2005) (citing *Cheuron, supra*, for the proposition that deference should be afforded to an agency’s “reasonable construction of an ambiguous statute”) and *In re Application of Indiana Michigan Power Co*, 275 Mich App 369, 373-374; 738 NW2d 289 (2007) (Courts must afford deference to the PSC’s administrative expertise if supported by the record or not otherwise unreasonable, but courts still have a responsibility to interpret statutory language and legislative intent) and *US Fidelity Ins & Guar Co v Michigan Catastrophic Claims Ass’n*, 274 Mich App 184, 203; 731 NW2d 481 (2007) (defer to an agency’s interpretation, unless it is “clearly wrong.”) By contrast, in *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, ___; ___ NW2d ___ (2007), the Court of Appeals appeared to again embrace the need for the interpretation to be “longstanding and consistent” in addition to not clearly erroneous or contrary to legislative intent.

In its brief on appeal to the Court of Appeals in this case, SBC cited *In re Complaint of Pelland*, 245 Mich App 675; 658 NW2d 849 (2003) for the proposition that the PSC decision should not be afforded deference. In that case, the Court of Appeals described the standard for evaluating PSC decisions as follows: “A reviewing court must give due deference to the administrative expertise of the PSC and may not substitute its judgment for that of the agency [citation omitted.] However, this does not mean that courts may abandon or delegate their responsibility to interpret statutory language and legislative intent.” *See id* at 681-682.

The controversy in *Pelland, supra*, concerned telecommunications service provider Ameritech's challenge of a PSC finding that Ameritech failed to properly disclose service rates, terms or conditions to the complaining customer, and that it charged the customer as an "end-user" for services she did not choose. The Court held that some of the PSC's factual findings were not supported by the record below. *See id* at 685. It also held that the PSC's interpretation of a statute it administers did not comport with the plain meaning of the subject statute when read together with a different portion of the statute containing a relevant definition of "end-user." *See id* at 686-687. Further, it held that the PSC exceeded its statutory-defined regulatory authority and took action contrary to Federal law by ordering Ameritech to develop procedures regarding customers' credit reports. *See id* at 688. However, the standard applied to reach its decision regarding the agency's legal interpretations did not appreciably differ from the standards put forth by Michigan courts following the decision in *Chevron, supra*.

Reading these decisions together, one might conclude that a longstanding agency interpretation of a statute it administers deserves more deference than a recent interpretation of a new statute. On the other hand, some cases conclude that the length of time has no bearing on the degree of deference owed, as long as the statute contains an ambiguity cogently and persuasively resolved by the agency in a manner not inconsistent with the plain language of the statute or apparent legislative intent. We share Justice Brickley's concerns expressed in his dissent in *Consumers Power Co, supra*, that without a consistent legal framework, the ability to discern legislative intent in future such cases remains hampered by "a lack of reliable guideposts." *See Consumers Power Co, supra* at 175.² We also agree that the "longstanding nature" of the legal interpretation at issue should be a factor, because it "serves the important purpose of furthering settled expectations." *See id* at 174.

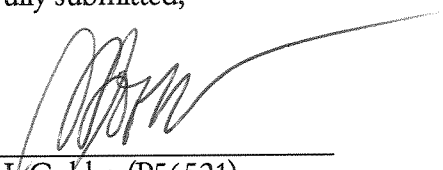
²Justice Brickley stated in his dissent that,

Conclusion and Recommendation

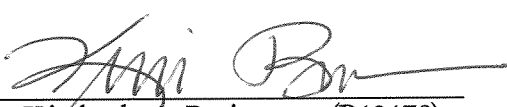
Based upon the evolution of Michigan case law and the rationale provided by those decisions and keeping in mind the “important purpose of furthering settled expectations” and of promoting uniformity, we recommend considering the following factors to best carry forth the intent of the Legislature: If the statute is clear and unambiguous, apply the rules of statutory construction to discern legislative intent. If the statute is ambiguous or vague (i.e., if reasonable minds can differ regarding its meaning), the degree of deference afforded to the agency’s interpretation of the law it administers depends upon the following factors: (1) How long the statute has been in existence, (2) whether the interpretation has been repeatedly and consistently applied by the agency, (3) whether the agency’s interpretation is reasonably consistent with the purpose and policies of the statute or regulation in question, and (4) whether the agency’s interpretation is contrary to existing law.

Respectfully submitted,

By: _____


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Dated: February 27, 2008

I am concerned that our standard of review of the legal interpretations of agencies is inconsistent. I believe that predictability in this area may only be achieved by determining the principles underlying such review. For these reasons, and because of a lack of reliable guideposts in determining legislative intent in this case, I would adopt a rule that this Court defer to an agency’s permissible, policy-based interpretation of the statutes that it administers. *See id.*